STATE OF MICHIGAN

COURT OF APPEALS

FALAH ZORI, Plaintiff-Appellant,	UNPUBLISHED December 22, 2011
v	No. 304153 Oakland Circuit Court Family Division
JEANDARC ZORI, Defendant-Appellee.	LC No. 2010-768362-DM

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right from a bench trial resulting in a judgment of divorce involving a custody dispute and a challenge to the distribution of the parties' marital assets and debts. We affirm.

Plaintiff argues that the trial court erred in its determination regarding the established custodial environment. Three standards of review apply in child custody cases. *McIntosh v McIntosh*, 282 Mich App 471, 474; 768 NW2d 325 (2009). This Court must affirm all custody orders unless the trial court's findings of fact were against the great weight of the evidence, the court committed an abuse of discretion, or the court made a clear legal error on a major issue. MCL 722.28; *Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008). Further, this Court should affirm the trial court's findings regarding the existence of an established custodial environment unless the evidence clearly preponderates in the opposite direction. *Id.* at 705. The trial court's final determination is reviewed for an abuse of discretion in light of the overriding mandate of the child's best interests. *McIntosh*, 282 Mich App at 475. Further, the trial court abuses its discretion when its decision is so grossly contrary to fact and logic that it evidences perversity of will, defiance of judgment, or the exercise of passion or bias. *Berger*, 277 Mich App at 705-706.

Further, an established custodial environment exists if:

> over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

"An established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child." *Berger*, 277 Mich App at 706. If an established custodial environment exists with one parent or with both parents, a trial court may not change the custodial environment unless there is clear and convincing evidence that a change in the custodial environment is in the child's best interests. MCL 722.27(1)(c); *In re AP*, 283 Mich App 574, 601-602; 770 NW2d 403 (2009).

Plaintiff's argument is that, since February 2010, he has been the primary caretaker of the children and that he has established a custodial environment with the children. Defendant argues that throughout the children's lives plaintiff has been absent, and she has been the primary caretaker. She contends that plaintiff's new and recent involvement in the children's lives is a façade for purposes of this custody dispute. The trial court found:

> [E]vidence shows that Defendant Mother is the parent who continued to live with the children when Plaintiff Father went to Arizona (2004) and Bay City, Michigan (2008-2009) to pursue business ventures to support the family. The testimony of both parties was that Plaintiff did not provide notice of his leavings, and did not discuss with Defendant the details concerning the care of the children during his absences. Further, Witness Crystal Kajy testified that she did not see Plaintiff at the children's activities, or even at their 8th grade gradations; Plaintiff Father admitted the same. However, since February 2010, Plaintiff-Father has shared in the care-giving tasks. In any case, the children have lived in the same home with Defendant Mother for 11 years during which Plaintiff Father was absent for significant periods of time. This Court finds that there is an established custodial environment with Defendant Mother.

We conclude that the trial court's finding were not against the great weight of the evidence. In determining that a custodial environment existed with defendant, the trial court focused on the entire length of the marriage and the parties' relationship with the children throughout the children's lives. The court found that the children lived in the marital home with defendant for 11 years and that she was the primary caregiver during this time. Both plaintiff and defendant testified that defendant was the primary caretaker of the children for most of their lives. Ms. Kajy testified that she observed defendant actively and frequently participate in the children's activities. In contrast, Ms. Kajy asserted that she seldom saw plaintiff at the children's sporting events or activities.

Since February 2010, plaintiff has shared in the care giving of the children; however, the evidence showed that the children go to defendant when they are sick or have medical issues. They look to defendant for their religious guidance. Defendant testified that the children also look to her for support in their extracurricular activities. In 2010, defendant helped their second eldest child raise $800 to contribute to his football team fundraiser. Plaintiff did not help the child raise any money. Also at trial, plaintiff testified that he attended the children's parent/teacher conferences, but he acknowledged that he disliked attending them. Although plaintiff recently tried to involve himself in the children's lives, it was not done over an "appreciable time" or for a "significant duration." Based on these facts, the trial court's

conclusion that there was an established custodial environment with defendant was not against the great weight of the evidence.

Next, plaintiff challenges the distribution of the parties' marital assets and debts. In relation to a property division, this Court reviews the trial court's findings of fact for clear error. The Court then examines whether the division is "fair and equitable in light of the facts." *Olson v Olson*, 256 Mich App 619, 622; 671 NW2d 64 (2003). A finding of fact is clearly erroneous, if after reviewing all the evidence, this Court "is left with the definite and firm conviction that a mistake has been made." *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). In considering whether the trial court committed clear error, this Court must give "special deference" to its assessment of the credibility of the witnesses. *Id*. "The dispositional ruling is discretionary and should be affirmed unless this Court is left with the firm conviction that the division was inequitable." *Id*. at 429–430.

It is well established that property division need not be mathematically equal in order to be equitable "as long as there is an adequate explanation for the chosen distribution." *Washington v Washington*, 283 Mich App 667, 673; 770 NW2d 908 (2009). In *Sparks v Sparks*, 440 Mich 141, 158–159; 485 NW2d 893 (1992), the Michigan Supreme Court held that a trial court has "broad discretion" to fashion an equitable property division based on a consideration of the following factors:

> (1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity. There may even be additional factors that are relevant to a particular case. For example, the court may choose to consider the interruption of the personal career or education of either party. The determination of relevant factors will vary depending on the facts and circumstances of the case. [*Id*. at 159–160 (internal citation omitted).]

Plaintiff argues that the division was inequitable. The goal of property division "is to reach an equitable distribution of property in light of all the circumstances." *Berger*, 277 Mich App at 716–717. In reaching that goal, the court may consider the factors outlined in *Sparks* as well as any other relevant facts. *Id*. at 717. The court need not consider each factor equally, but must not place disproportionate weight on any one factor. *Id*. at 717, 721.

The trial court cited various grounds to support the unequal division of the property in this case. The court noted that, historically, plaintiff has financially supported his family, while defendant was the children's primary caretaker. The court also noted that defendant earns significantly less income than plaintiff. The court noted:

> [r]egarding past relations and conduct of the parties, as noted, although Defendant testified and maintains that the breakdown occurred because of Plaintiff's domestic violence, absence from the marriage and infidelity, evidence shows that Plaintiff continued to provide for the family and Defendant never sought to end the marriage. The Court cannot find that abuse and infidelity were the sole causes

> of the breakdown. The Court can find, however, that these factors were significant causes of the breakdown.

These are proper considerations in evaluating the equitability of the proposed property division pursuant to *Sparks*. Thus, the trial court did not abuse its discretion.

Next, plaintiff argues that the trial court erred in its valuation of the bank accounts. The actual date to be used for valuation of a marital asset for purposes of dividing and distributing assets in a divorce action is within the discretion of the trial court. *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). We concluded that the trial court's valuation of the bank accounts at the time the complaint was filed was not an abuse of discretion.

The parties provided evidence that the bank account balances, on the date the complaint was filed, were $213,979.75 and $67,890.00. There was a mutual restraining order entered that prevented the parties from "dispos[ing] of any of the parties' real or personal property." The restraining order also stated that it "does not prevent the parties from providing for the necessities of life or from engaging in transactions necessary in the ordinary courses of business." The bank accounts were under plaintiff's name and he had access to the funds. Plaintiff testified that he withdrew a total $87,360.75 from the accounts. During trial, plaintiff accounted for the use of the funds and argued that his use of the funds did not violate the restraining order; however, it is evident that the court did not give credence to plaintiff's explanations or accounting of the funds he withdrew. It was equitable for the trial court to value these assets at the time the complaint was filed because there was a mutual restraining order restricting plaintiff's use of the funds, and yet, he withdrew almost $90,000. It was not improper for the trial court to divide the accounts before the dissipation of assets.

Plaintiff also argues that the trial court abused its discretion when it ordered that plaintiff buyout defendant's interest in Bay Bay, Inc., and Bay One, L.L.C. The court ordered:

> IT IS FURTHER ORDERED that the Bay Bay, Inc. and Bay One, Inc. entities are awarded to Plaintiff Husband free and clear of any right, title, claim or interest of Defendant wife. In exchange for her interests, Plaintiff Husband shall pay Defendant Wife Fifty Five Percent (55%) of the present value of the payments totaling $32,086.00.

At trial, John Alfonsi, a qualified expert in business valuation, testified that there are two possible ways to divide these assets. First, he opined that defendant could receive a percentage of the net cash proceeds from each payment the entities receive. Second, he opined that defendant could receive a percentage of the present value of payments received at the appropriate interest rate and risk level. In calculating the present value of payments, Alfonsi considered the risk and opined that there was little risk as all the parties involved were making timely payments. There was no evidence that contradicted Alfonsi's testimony regarding the present value of payments or alternative ways to divide these assets. Accordingly, the trial court did not abuse it discretion in awarding defendant 55 percent of the present value of the payments as determined by Alfonsi.

To the extent plaintiff argues that the proceeds from the sale of the party store are not marital property, we disagree. "Generally, marital property is that which is acquired or earned during the marriage, whereas separate property is that which is obtained or earned before the marriage." *Cunningham v Cunningham*, 289 Mich App 195, 201; 795 NW2d 826 (2010), citing MCL 552.19. Marital property is subject to division, but separate property generally "may not be invaded." *Korth v Korth*, 256 Mich App 286, 291; 662 NW2d 111 (2003). The party store was acquired during the marriage. Further, plaintiff testified that he purchased the party store with marital funds and that, but for defendant taking care of the children, he would not have been successful in this business. Subsequently, plaintiff sold the store during the marriage. Plaintiff currently receives a stream of income from the sale of the party store. Accordingly, the proceeds from the sale, i.e., the monthly payments, were appropriately considered a marital asset subject to equitable division.

Plaintiff also argues that the trial court erred in awarding defendant the marital home. At trial, the parties agreed that the value of the marital home was $0. There was also testimony that defendant continuously lived in the marital home with the children. That is, she was never absent from the marital home during the marriage. Plaintiff, on the other hand, did not continuously live in the marital home. In 2004, he lived in Arizona for almost year, and from 2008 to 2010, he lived in Bay City, Michigan. At trial, defendant testified that if she were awarded the marital home, she would remain there with the children, keeping them in the same school district and with the same friends. Based on these facts, we hold that it was not inequitable for the court to award defendant the marital home, a $0 asset in which she and the children have continuously lived.

Defendant also argues that the trial court abused its discretion in ordering plaintiff to contribute approximately $7,000 towards defendant's credit card debt. Defendant testified that she had three credit cards (Chase, GM, and CitiBank) and that her debt was approximately $24,000. She began to accrue the debt in 2004 when she was unemployed and plaintiff was away in Arizona. She testified that she used the credit cards to pay for household expenses, including the utilities and phone bills. She also asserted that she used the credit cards to purchase food and clothing for the children. Defendant testified that she was not seeking contribution on her Chase credit card. She accumulated approximately $10,000 in personal debt, i.e., not related to family expenses, on this card. At trial, she clarified that she was only requesting contribution of approximately $14,000 for the debt on the GM and Citibank credit cards. The court ordered plaintiff to contribute approximately $7,000 towards the credit card debt. We conclude that the trial court's finding that the $14,000 credit card debt was marital debt subject to distribution was not clearly erroneous because that debt was incurred in order to pay the household expenses and maintain the children.

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause